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FIDELITY CAPITAL FUNDING, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

WASHINGTON MUTUAL BANK, a federal savings bank, as successor at law to Long Beach Mortgage Company,) CASE NO. CV 08 1407 EMC
Plaintiff,) ANSWER OF FIDELITY CAPITAL
v.) FUNDING, INC.
FIDELITY CAPITAL FUNDING, INC., a California corporation) Action Filed: March 12, 2008
Defendant.)

Defendant FIDELITY CAPITAL FUNDING, INC. (hereinafter, "defendant"), for its answer to plaintiff WASHINGTON MUTUAL BANK's (hereinafter, "plaintiff") Complaint for breach of contract and damages responds as follows:

1. In answer to paragraph 1 of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, and on that basis denies each and every allegation contained therein.

2. In answer to paragraph 2 of the Complaint, defendant admits all allegations therein.

3. In answer to Paragraph 3 of the Complaint, defendant admits that if the allegation as to the residency of the plaintiff is accurate, then jurisdiction would be proper, as the action is between citizens of different states. Except as so admitted, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis, defendant denies each and

1 every allegation contained in said paragraph.

2 4. In answer to Paragraph 4 of the Complaint, defendant admits that if the allegation as
3 to the residency of the plaintiff is accurate, then jurisdiction is proper as alleged. Except as so
4 admitted, defendant is without knowledge or information sufficient to form a belief as to the truth of
5 the allegation, and on that basis, defendant denies each and every allegation contained in said
6 paragraph.

7 5. In answer to Paragraph 5 of the Complaint, defendant is without knowledge or
8 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
9 and on that basis denies each and every allegation contained therein.

10 6. In answer to Paragraph 6 of the Complaint, defendant admits that it has on occasion
11 so acted as part of its business. Except as so admitted, defendant is without knowledge or information
12 sufficient to form a belief as to the truth of the allegation, and on that basis, defendant denies each and
13 every allegation contained in said paragraph.

14 7. In answer to Paragraph 7 of the Complaint, defendant is without knowledge or
15 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
16 and on that basis denies each and every allegation contained therein.

17 8. In answer to Paragraph 8 of the Complaint, defendant is without knowledge or
18 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
19 and on that basis denies each and every allegation contained therein.

20 9. In answer to Paragraph 9 of the Complaint, defendant admits that it entered into an
21 agreement with plaintiff and that a copy of that agreement is attached to the Complaint. Except as so
22 admitted, defendant is without knowledge or information sufficient to form a belief as to the truth of
23 the allegation, and on that basis, defendant denies each and every allegation contained in said
24 paragraph.

25 10. In answer to Paragraph 10 of the Complaint, defendant admits that the agreement
26 entered into between defendant and plaintiff incorporated by reference a Seller Guide and that only
27 a portion of that Seller Guide is attached to the Complaint. Except as so admitted, defendant is
28 without knowledge or information sufficient to form a belief as to the truth of the allegation, and on

1 that basis, defendant denies each and every allegation contained in said paragraph.

2 11. In answer to Paragraph 11 of the Complaint, defendant admits that the Seller Guide
3 provides as alleged. Except as so admitted, defendant is without knowledge or information sufficient
4 to form a belief as to the truth of the allegation, and on that basis, defendant denies each and every
5 allegation contained in said paragraph.

6 12. In answer to Paragraph 12 of the Complaint, defendant admits that the agreement
7 provides as alleged. Except as so admitted, defendant is without knowledge or information sufficient
8 to form a belief as to the truth of the allegation, and on that basis, defendant denies each and every
9 allegation contained in said paragraph.

10 13. In answer to Paragraph 13 of the Complaint, defendant admits that the described loans
11 were the subject of business transactions between defendant and plaintiff, but denies the number of
12 loans alleged, as several of the transactions were merely refinances of the same loan. Except as so
13 admitted, defendant is without knowledge or information sufficient to form a belief as to the truth of
14 the allegation, and on that basis, defendant denies each and every allegation contained in said
15 paragraph.

16 14. Answering paragraph 14 of the Complaint, defendant is without knowledge or
17 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
18 and on that basis denies each and every allegation contained therein.

19 15. Answering paragraph 15 of the Complaint, defendant admits that it received
20 correspondence from plaintiff requesting payment. Except as so admitted, defendant is without
21 knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis,
22 defendant denies each and every allegation contained in said paragraph.

23 16. Answering paragraph 16 of the Complaint, defendant admits that it has not agreed to
24 pay the monies demanded by plaintiff. Except as so admitted, defendant is without knowledge or
25 information sufficient to form a belief as to the truth of the allegation, and on that basis, defendant
26 denies each and every allegation contained in said paragraph.

27 17. In answer to Paragraph 17 of the Complaint, defendant is without knowledge or
28 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,

1 and on that basis denies each and every allegation contained therein.

2 18. In answer to Paragraph 18 of the Complaint, defendant is without knowledge or
3 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
4 and on that basis denies each and every allegation contained therein.

5 19. In answer to Paragraph 19 of the Complaint, defendant is without knowledge or
6 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
7 and on that basis denies each and every allegation contained therein.

8 20. In answer to Paragraph 20 of the Complaint, defendant is without knowledge or
9 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
10 and on that basis denies each and every allegation contained therein.

11 21. In answer to Paragraph 21 of the Complaint, defendant is without knowledge or
12 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
13 and on that basis denies each and every allegation contained therein.

14 22. In answer to Paragraph 22 of the Complaint, defendant is without knowledge or
15 information sufficient to form a belief as to the truth of the allegations contained in said paragraph,
16 and on that basis denies each and every allegation contained therein.

17 **AFFIRMATIVE DEFENSES TO ALL CAUSES OF ACTION**

18 **FIRST AFFIRMATIVE DEFENSE**

19 **(Failure to State a Cause of Action)**

20 1. Plaintiff's Complaint, and each cause of action therein, fails to state facts sufficient to
21 constitute a cause of action against defendant.

22 **SECOND AFFIRMATIVE DEFENSE**

23 **(Acts/Omissions of Third Parties)**

24 2. The loss, if any, was caused by the criminal acts/omissions, negligence or other
25 culpability of persons or entities over which defendant had no control, and for whom defendant has
26 no legal obligation.

THIRD AFFIRMATIVE DEFENSE

(Limitation)

3. Defendant's liability, if any, is limited pursuant to the terms of any purported written, implied or oral agreements with plaintiff and/or its agents and/or others who bind plaintiff to the agreements.

FOURTH AFFIRMATIVE DEFENSE

(Improper/Inconvenient Forum Selection)

4. This Court is not the agreed upon, appropriate or convenient forum to resolve this dispute.

FIFTH AFFIRMATIVE DEFENSE

(Laches/Estoppel)

5. Plaintiff's Complaint and each and every cause of action and claim, if any, contained therein, is barred by the doctrines of laches and equitable estoppel.

SIXTH AFFIRMATIVE DEFENSE

(Default)

6. All damages, if any, sustained by plaintiff were proximately caused by the act or default of plaintiff or persons/entities for whom plaintiff is responsible.

SEVENTH AFFIRMATIVE DEFENSE

(Comparative/Contributory Negligence)

7. Defendant is informed and believes, and on that basis alleges, that plaintiff's alleged damages, if any, are wholly or in part, directly and proximately caused by the acts, omissions, negligence or wrongdoing of plaintiff's agents, or other persons or entities for whom plaintiff is legally responsible and that defendant has no liability to plaintiff. In the alternative, defendant's liability, if any, should be reduced and mitigated in the proportion to the fault of plaintiff's agents, and others for whom plaintiff is responsible.

EIGHTH AFFIRMATIVE DEFENSE

(Lack of Standing)

8. Plaintiff lacks standing to bring suit in that it has not sustained any damage.

NINTH AFFIRMATIVE DEFENSE

(Prior Breach)

9. Plaintiff has breached its contractual obligations to defendant and, therefore, the present action is barred.

TENTH AFFIRMATIVE DEFENSE

(Lack of Good Faith)

10. Plaintiff is barred from recovery because plaintiff lacked good faith in the performance and enforcement of any alleged contract.

ELEVENTH AFFIRMATIVE DEFENSE

(Ratification)

11. If plaintiff suffered any loss, injury, damage or detriment, plaintiff consented to and ratified the acts/omissions of defendant, and by reason thereof, plaintiff is barred from or diminished in recovery as to defendant.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

12. Defendant alleges that plaintiff has failed to properly mitigate its damages, if any in fact there are, and to the extent of such failure to mitigate, any damages awarded to plaintiff must be reduced accordingly.

THIRTEENTH AFFIRMATIVE DEFENSE

(Performance of Duties)

13. Defendant alleges that it has fully performed any and all contractual, statutory and all other duties to plaintiff. Therefore, plaintiff is estopped to assert any cause of action against defendant.

FOURTEENTH AFFIRMATIVE DEFENSE

(Consent)

14. Defendant alleges that by itself or through its agents, plaintiff consented to all conduct of defendant. Therefore, plaintiff is estopped to assert any cause of action against defendant.

FIFTEENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

15. Defendant alleges that the allegations set forth in the Complaint are barred by the doctrine of Unclean Hands. Therefore, Plaintiff is estopped to assert any cause of action against defendant.

SIXTEENTH AFFIRMATIVE DEFENSE

(Justification)

16. Defendant alleges that it was justified in doing, or not doing, any of the things and/or actions alleged in the Complaint. Therefore, plaintiff is estopped to assert any cause of action against defendant.

SEVENTEENTH AFFIRMATIVE DEFENSE

(No Causation)

17. Defendant alleges that there is no causal relationship between any injuries or damages allegedly sustained by plaintiff, and any alleged wrongful act by defendant.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Failure of Performance)

18. Defendant alleges that plaintiff has failed to perform all of the terms, conditions, covenants and promises defendant is due. Therefore, plaintiff is estopped to assert any cause of action against defendant.

NINETEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

19. The Complaint and each and every alleged cause of action therein is barred by each and every applicable Statute of Limitations.

TWENTIETH AFFIRMATIVE DEFENSE

(Discharge)

20. Defendant alleges that it cannot be held liable to plaintiff on the grounds that, to the extent it owed to plaintiff any duty or obligation, the duty or obligation was discharged.

TWENTY FIRST AFFIRMATIVE DEFENSE

(Waiver)

21. Defendant alleges that the Complaint, and each of its alleged causes of action, is barred in whole or in part by the equitable doctrine of waiver.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Accord and Satisfaction)

22. Defendant alleges that plaintiff is barred from recovery because defendant was relieved, excused, and/or discharged from any obligation and liability due to plaintiff's consent and ratification of any actions by defendant, and/or by accord and satisfaction between the parties.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Failure to Act)

23. Defendant alleges that plaintiff's recovery is barred because the damages and losses allegedly suffered by plaintiff, if any, were the sole and proximate result of plaintiff's own actions, or its failure to act.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Reservation of Rights)

24. Defendant alleges it currently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, defenses available. This defendant reserves herein the right to assert additional defenses in the event discovery indicates that they would be appropriate.

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1 WHEREFORE, defendant prays that:

- 2 1. Plaintiff takes nothing by said Complaint;
- 3 2. Plaintiff's Complaint be dismissed with prejudice;
- 4 3. Defendant recovers its costs of suit herein; and
- 5 4. For such other and further relief as may be just.
- 6

7 DATED: April 28, 2008

LEWIS BRISBOIS BISGAARD & SMITH LLP

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9 By: 

10 WILLIAM P. BURANICH
11 Attorneys for Defendant
12 FIDELITY CAPITAL FUNDING, INC.

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